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its data through a variety of sources, including through its own campaign activities and other commercial transactions.

For example, Jeb 2016 entered into a list exchange agreement with the Republican National Committee ("RNC") in July 2015. As the news article cited in the Second Supplemental Complaint explains:

This is a standard arrangement in both parties, designed to permit candidates to benefit from one of the few durable resources in American politics: a national party's voter database. In exchange for access to it, candidates pledge that after the election they will enrich the database by returning intelligence gathered on the electorate through their interactions with individual voters.

Sasha Issenberg, *Why Isn't Rand Paul Making a Data Deal with the GOP?*, Bloomberg Politics (July 24, 2015), available at <http://www.bloomberg.com/politics/articles/2015-07-24/why-isn-t-rand-paul-making-a-data-deal-with-the-gop->.

In addition, Jeb 2016 entered into an arms-length, commercial vendor relationship with i360, LLC ("i360") in August 2015 for a subscription to i360's raw data. See Jeb 2016, 2015 October Quarterly Report, at 4808-09 (filed Oct. 15, 2015). Jeb 2016 pays fair-market value for the data subscription, and duly reports its payments to i360 on its FEC reports.

Jeb 2016 has not had a vendor relationship with the GOP Data Trust.

THE LAW

The Commission's Coordinated Communication Regulations

The Commission's regulations provide that "[a] payment for a coordinated communication is made for the purpose of influencing a Federal election, and is an in-kind contribution . . . to the candidate [or] authorized committee . . . with whom or which it is coordinated . . ." 11 C.F.R. § 109.21(b)(1). A communication is deemed to be "coordinated" with a candidate or authorized committee if it satisfies all elements of the three-pronged test set forth below.

A. The Payment Prong

The payment prong is satisfied if the communication "[i]s paid for, in whole or in part, by a person other than that candidate [or] authorized committee." *Id.* § 109.21(a)(1).

B. The Content Prong

In order for the content prong to be satisfied, the communication must be a "public communication." *Id.* § 109.21(c). The term "public communication" means "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor



advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising," but "shall not include communications over the Internet, except for communications placed for a fee on another person's Web site." *Id.* § 100.26.

A public communication satisfies the content prong of the Commission's coordinated communication regulations if, in relevant part, it:

- Constitutes an "electioneering communication" as defined in Section 100.29;¹
- "[D]isseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee";
- "[E]xpressly advocates . . . the election or defeat of a clearly identified candidate for Federal office";
- "[I]s the functional equivalent of express advocacy" because "it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate"; or
- "[R]efers to a clearly identified Presidential or Vice Presidential candidate and is publicly distributed or otherwise publicly disseminated in a jurisdiction during the period of time beginning 120 days before the clearly identified candidate's primary or preference election in that jurisdiction, or the nominating convention or caucus in that jurisdiction, up to and including the day of the general election."

Id. § 109.21(c)(1)-(5).

C. The Conduct Prong

Finally, the conduct prong of the Commission's coordinated communication regulations is satisfied if one of five conduct standards is present. Relevant here, the "common vendor" standard of the conduct prong is satisfied if all of the following three conditions are met:

¹ An electioneering communication in connection with presidential candidates "means any broadcast, cable, or satellite communication that: (1) Refers to a clearly identified candidate for Federal office; [and] (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, and the candidate referenced is seeking the nomination of that political party." 11 C.F.R. § 100.29(a). "In the case of a candidate for nomination for President or Vice President," a communication is "publicly distributed" if it is "aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system" and "[c]an be received by 50,000 or more persons in a State where a primary election . . . is being held within 30 days" or "[c]an be received by 50,000 or more persons in the United States within the period between 30 days before the first day of the national nominating convention and the conclusion of the convention." *Id.* § 100.29(b)(3).

First, “[t]he person paying for the communication, or an agent of such person, contracts with or employs a commercial vendor . . . to create, produce, or distribute the communication.” *Id.* § 109.21(d)(4)(i). A “commercial vendor” is “any person[] providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services.” *Id.* § 116.1(c). “Thus, this standard only applies to a vendor whose usual and normal business includes the creation, production, or distribution of communications, and does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture.” *Explanation & Justification for Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 436 (Jan. 3, 2003).

Second, “[t]hat commercial vendor, including any owner, officer, or employee of the commercial vendor, has provided [certain] services to the candidate who is clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, or the opponent’s authorized committee, or a political party committee, during the previous 120 days.” 11 C.F.R. § 109.21(d)(4)(ii). The Commission’s coordinated communication regulations enumerate nine specific services that “put[] the commercial vendor in a position to acquire information about the campaign plans, projects, activities, or needs of the candidate . . . that is material to the creation, production or distribution of the communication” and “place[] the ‘common vendor’ in a position to convey [such] information . . . to the person paying for the communication.” *Coordinated and Independent Expenditures*, 68 Fed. Reg. at 436. These nine services are:

- Development of media strategy, including the selection of purchasing of advertising slots;
- Selection of audiences;
- Polling;
- Fundraising;
- Developing the content of a public communication;
- Producing a public communication;
- Identifying voters or developing voter lists, mailing lists, or donor lists;
- Selecting personnel, contractors, or subcontractors; or
- Consulting or otherwise providing political or media advice.

11 C.F.R. § 109.21(d)(4)(ii).



Finally, "[t]hat commercial vendor uses or conveys to the person paying for the communication" either:

- Information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or
- Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.

Id. § 109.21(d)(4)(iii). "This requirement encompasses situations in which the vendor assumes the role of a conduit of information between a candidate . . . and the person making or paying for the communication, as well as situations in which the vendor makes use of the information received from the candidate . . . without actually transferring that information to another person."

Coordinated and Independent Expenditures, 68 Fed. Reg. at 437.

When the Commission promulgated its coordinated communication regulations, it stated that the common vendor standard does not "create[] any 'prohibition' on the use of common vendors" and expressly rejected a proposal "establish[ing] a presumption of coordination" when common vendors are involved. *Id.* at 436. Moreover, the Commission "restrict[ed] the potential scope of the 'common vendor' standard by limiting its application to vendors who provide specific services that, in the Commission's judgment, are conducive to coordination between a candidate . . . and a third party spender." *Id.* "[E]ven those vendors who provide one or more of the specified services are not in any way prohibited from providing services to both candidates . . . and third party spenders." *Id.* Instead, the common vendor standard "focuses on the sharing of information about plans, projects, activities, or needs of a candidate . . . through a common vendor to the spender who pays for a communication." *Id.*

DISCUSSION

I. The Second Supplemental Complaint Fails to Meet the "Reason to Believe" Threshold and Should Be Dismissed On This Basis Alone.

ADLF alleges in the Second Supplemental Complaint that the Bush Respondents are "involved in [a] scheme to skirt the Commission's 'coordinated communication' regulations by passing their most valuable data to outside organizations via the GOP Data Trust and . . . data firm i360." Second Supplemental Complaint at 9. Yet, as explained below, ADLF's allegations are purely speculative and the Second Supplemental Complaint fails to set forth specific facts which, if proven true, would constitute a violation of the Commission's coordinated communication regulations by the Bush Respondents. In fact, ADLF devotes only two sentences to the eleven

Republican presidential campaigns named as respondents and does not mention any of these campaigns by name in the body of the Second Supplemental Complaint. Indeed, because the Second Supplemental Complaint fails to meet the “reason to believe” threshold, the Commission should dismiss the Bush Respondents from this matter on this basis alone.

A. The Second Supplemental Complaint Consists of Nothing More Than Rank Speculation and Innuendo.

The Second Supplemental Complaint fails to meet the Commission’s well-established “reason to believe” standard because its allegations are based upon pure speculation and ADLF fails to include any credible evidence in support of these allegations. ADLF flatly speculates that because, “according to press reports, eleven authorized committees of Republican Presidential candidates have also entered into agreements with the Data Trust, i360, or both,” these committees are “automatically pass[ing] material information about the committees’ activities to any and all outside groups [in] violation of the Commission’s coordinated communication rule.” Second Supplemental Complaint at 13-14.

Commission regulations require that a complaint “contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction.” 11 C.F.R. § 111.4(d)(3). A “reason to believe” finding is appropriate “only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA.” Statement of Reasons of Commissioners David M. Mason, Karl J. Sandsstrom, Bradley A. Smith, and Scott E. Thomas in MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee), at 1 (Dec. 21, 2000). “Unwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true.” *Id.* at 2.

Here, the Second Supplemental Complaint bases its allegations that the Bush Respondents violated the Commission’s coordinated communication regulations on their asserted fact that the Bush Respondents have “entered into agreements with the Data Trust, i360, or both.” Second Supplemental Complaint at 13. The news article cited for this asserted fact, however, says no such thing. Instead, the news article simply states that the Bush Respondents “have already executed [a] data agreement[] with the RNC.” Sasha Issenberg, *Why Isn’t Rand Paul Making a Data Deal with the GOP?*, Bloomberg Politics (July 24, 2015). The Second Supplemental Complaint does not provide any evidence that the Bush Respondents have “entered into agreements with the Data Trust, i360, or both.”²

In sum, the Second Supplemental Complaint contains little more than rank speculation and innuendo, including the remarkable assertion that because the Bush Respondents have entered

² Jeb 2016 commenced a vendor relationship with i360 in August 2015—after the publication of the news article cited in the Second Supplemental Complaint and around the same time that ADLF filed the Second Supplemental Complaint with the Commission. Moreover, the fact that Jeb 2016 had a vendor relationship with i360 was not public information until Jeb 2016 filed its 2015 October Quarterly Report—well after ADLF filed the Second Supplemental Complaint with the Commission. For the sake of completeness, we are addressing Jeb 2016’s vendor relationship with i360 in Section II below.

into a list exchange with the RNC, unknown outside groups who have retained the services of the Data Trust and/or i360 *must* be making unknown illegally coordinated communications with the Bush Respondents. The Commission has a long history of summarily rejecting complaints that were based upon speculation and innuendo. The Commission should do the same here.

B. The Second Supplement Complaint Does Not Allege Specific Facts Which, If Proven True, Would Constitute a Violation of FECA or the Commission's Regulations.

The Second Supplemental Complaint alleges that the Bush Respondents are participants in a "scheme to skirt the Commission's 'coordinated communication' regulations by passing their most valuable data to outside organizations via the GOP Data Trust and . . . data firm i360," but fails to set forth specific facts which, if proven true, would amount to a violation of the Commission's coordinated communication regulations by the Bush Respondents.

First, ADLFF has not identified a single communication that was allegedly coordinated with the Bush Respondents through a common vendor. The Commission's coordinated communication regulations are premised on the existence of a "communication." See 11 C.F.R. § 109.21(a) ("A communication is coordinated with a candidate, an authorized committee . . . or an agent of any of the foregoing when the communication" satisfies all three prongs of the Commission's coordinated communication test.). In order for there to be a violation of the Commission's coordinated communication regulations, there must be a communication.

Second, ADLFF has not identified any outside organizations that have paid for a communication allegedly coordinated with the Bush Respondents through a common vendor. Under the payment prong of the Commission's coordinated communication regulations, a communication must be "paid for, in whole or in part, by a person other than that candidate [or] authorized committee" in order to constitute a coordinated communication. *Id.* § 109.21(a)(1). In order for there to be a violation of the Commission's coordinated communication regulations, there must be a third party spender who has paid for a communication.

Finally, given that ADLFF has not identified a single communication that was allegedly coordinated with the Bush Respondents through a common vendor, ADLFF also has not set forth facts to satisfy the content prong of the Commission's coordinated communication regulations. Under the content prong, a communication must be a "public communication" that meets the content requirements discussed above. See *id.* § 109.21(c).

Commissioners have previously rejected a coordinated communication complaint that "d[id] not present any analysis or facts that support the application of section 109.21." Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioner Caroline C. Hunter in MUR 6540 (Rick Santorum for President), at 23 (July 25, 2013). "Instead of presenting facts, the complaint seem[ed] to rely on the 'when there's smoke, there's fire' speculation that the Commission has already determined is insufficient to justify an investigation." *Id.* Because "[t]he complaint fail[ed] to provide a single example of any communication . . . that was somehow

coordinated, let alone whether any communications come within the content prong of the coordination rule,” the Commission did not vote to find reason to believe. *Id.*

Put simply, ADLF has only alleged specific facts related to the third prong of the Commission’s coordinated communication regulations—the conduct prong, and even then they did not set forth sufficient facts to prove that any of the conduct prong’s standards were met—and completely ignored the existence of the first two prongs. The Commission cannot find reason to believe that the Bush Respondents violated the Commission’s coordinated communication regulations when the Second Supplemental Complaint fails to identify the existence of any allegedly coordinated communications or any outside organizations that allegedly paid for these communications.

II. Nevertheless, the Bush Respondents Have Not Engaged in Conduct That Satisfies the Common Vendor Standard of the Conduct Prong.

ADLF’s allegation that the Bush Respondents are “involved in [a] scheme to skirt the Commission’s ‘coordinated communication’ regulations by passing their most valuable data to outside organizations via the GOP Data Trust and . . . data firm i360” is unfounded and contradicted by the facts. Specifically, ADLF alleges that the Bush Respondents “entered into agreements with the Data Trust, i360, or both,” which are purportedly common vendors with several outside organizations, and that these vendors have “technology that *automatically* passes material information about the committees’ activities to any and all outside groups . . . [in] violation of the Commission’s coordinated communication rule.” Second Supplemental Complaint at 13-14.

As discussed above, ADLF has not provided any evidence that the Bush Respondents have entered into agreements with the Data Trust or i360. Instead, they solely rely on a news article which states that “former Governor Jeb Bush of Florida . . . ha[s] already executed [a] data agreement[] with the RNC.” Sasha Issenberg, *Why Isn’t Rand Paul Making a Data Deal with the GOP?*, Bloomberg Politics (July 24, 2015). As explained below, neither Jeb 2016’s list exchange agreement with the RNC nor its commercial vendor relationship with i360 implicate the common vendor standard of the conduct prong.³

A. Jeb 2016’s List Exchange Agreement with the RNC Does Not Implicate the Common Vendor Standard of the Conduct Prong.

Jeb 2016’s list exchange agreement with the RNC does not implicate the common vendor standard of the conduct prong for two reasons.

³ Although ADLF provided no evidence that i360 is a vendor of Jeb 2016 (and the vendor relationship was not even public knowledge until well after the Second Supplemental Complaint was filed), we are voluntarily providing the Commission with information about Jeb 2016’s vendor relationship with i360 to demonstrate that it also does not implicate the common vendor standard of the conduct prong.



First, the RNC is not a "common vendor." In order to qualify as a "common vendor," the RNC would have to be a "commercial vendor." A "commercial vendor" is "any person[] providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services. 11 C.F.R. § 116.1(c). The RNC is a federal political committee registered with the FEC, not a commercial vendor. Moreover, the RNC would have to be retained or employed by the outside organization paying for the allegedly coordinated communication in order to qualify as a "common vendor" under the Commission's coordinated communication regulations. *See id.* § 109.21(d)(4)(i). "Thus, [the common vendor] standard only applies to a vendor whose usual and normal business includes the creation, production, or distribution of communications, and does not apply to the activities of persons who do not create, produce, or distribute communications as a commercial venture." *Coordinated and Independent Expenditures*, 68 Fed. Reg. at 436.

Second, even if the RNC did qualify as a common vendor, Jeb 2016's list exchange agreement with the RNC does not allow non-public information about Jeb 2016's campaign plans, projects, activities, or needs to be conveyed to any outside organizations via the RNC. As the news article cited in the Second Supplemental Complaint explains, Jeb 2016's list exchange agreement with the RNC:

[I]s a standard arrangement in both parties, designed to permit candidates to benefit from one of the few durable resources in American politics: a national party's voter database. In exchange for access to it, candidates pledge that *after the election* they will enrich the database by returning intelligence gathered on the electorate through their interactions with individual voters.

Sasha Issenberg, *Why Isn't Rand Paul Making a Data Deal with the GOP?*, Bloomberg Politics (July 24, 2015) (emphasis added). Thus, it would not be possible for the RNC to share such information with any outside organizations until after the election.

For these reasons, Jeb 2016's list exchange agreement with the RNC does not implicate the common vendor standard of the Commission's coordinated communication regulations.

B. Jeb 2016's Contractual Relationship with i360 Does Not Implicate the Common Vendor Standard of the Conduct Prong.

Although ADLF did not provide any evidence in the Second Supplemental Complaint that Jeb 2016 has contracted with i360, we are voluntarily providing information about Jeb 2016's vendor relationship with i360 to demonstrate that this relationship also does not implicate the common vendor standard of the conduct prong.

Jeb 2016 is merely a subscriber to i360's raw data. Jeb 2016 has not retained i360 to provide any services related to the committee's public communications. The Commission's coordinated communication regulations provide that the common vendor standard is satisfied only when the



commercial vendor has provided any of the following services to the candidate or the candidate's authorized committee during the previous 120 days:

- Development of media strategy, including the selection or purchasing of advertising slots;
- Selection of audiences;
- Polling;
- Fundraising;
- Developing the content of a public communication;
- Producing a public communication;
- Identifying voters or developing voter lists, mailing lists, or donor lists;
- Selecting personnel, contractors, or subcontractors; or
- Consulting or otherwise providing political or media advice.

11 C.F.R. § 109.21(d)(4)(ii).

i360 does not provide any of these services to Jeb 2016.⁴ It simply provides raw data. Thus, Jeb 2016's vendor relationship with i360 does not implicate the common vendor standard of the Commission's coordinated communication regulations.

CONCLUSION

For all of the reasons set forth above, the Commission should find that there is no reason to believe that a violation occurred and should promptly dismiss the Bush Respondents from this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Megan L. Sowards".

Megan L. Sowards, General Counsel
Brändis L. Zehr, Deputy General Counsel

⁴ Jeb 2016's 2015 October Quarterly Report discloses a \$1,486.51 disbursement to i360 for "online fundraising." Jeb 2016, 2015 October Quarterly Report, at 4809 (filed Oct. 15, 2015). However, this disbursement was for the acquisition of raw donor data.